

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

APRIL TERM, 1914.

No. 2668.

121

JACOB KEROES, APPELLANT,

vs.

CHRISTINA CECELIA COLEMAN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MARCH 25, 1914.

PRINTED MAY 11, 1914.

Court of Appeals of the District of Columbia

APRIL TERM, 1914.

No. 2668.

JACOB KEROES, APPELLANT,

vs.

CHRISTINA CECELIA COLEMAN, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original. Print	
Caption	<i>a</i>	1
Declaration	1	1
Demurrer	7	5
Demurrer sustained; motion for bill of particulars granted.....	9	6
Order discontinuing third count of declaration; judgment; ap- peal noted	9	6
Memorandum: Appeal bond approved and filed.....	10	7
Assignment of error	10	7
Designation of record	10	7
Clerk's certificate	11	8

In the Court of Appeals of the District of Columbia.

No. 2668.

JACOB KEROES, Appellant,
vs.
CHRISTINA CECILIA COLEMAN.

a Supreme Court of the District of Columbia.

At Law. No. 56009.

JACOB KEROES, Plaintiff,
vs.
CHRISTINA CECILIA COLEMAN, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed July 21, 1913.

In the Supreme Court of the District of Columbia.

At Law. No. 56009.

JACOB KEROES, Plaintiff,
v.
CHRISTINA CECILIA COLEMAN, Defendant.

I. The plaintiff, Jacob Keroes, complains of the defendant, Christina Cecilia Coleman, of a plea that the said defendant render unto the said plaintiff the sum of two thousand dollars, with legal interest thereon from the tenth day of May, in the year 1912, which the said defendant owes to the said plaintiff and unjustly detains from him, for that,

Whereas, heretofore, to-wit, on the twelfth day of March in the

year 1908, at the city of Washington in the District of Columbia, by a certain indenture then and there made and executed by and between the plaintiff and the defendant, which said indenture the plaintiff now brings into court here, the date whereof is the day and year above written, the same being sealed with the seal of one Percy H. Russell who was the agent of the defendant duly authorized to execute and seal the said indenture for and on behalf of the defendant, and whose action in that behalf was thereafter duly and expressly ratified in writing by the defendant,

The defendant did demise, lease and let unto the plaintiff certain premises, being a parcel of real property situate in the city aforesaid, and which is particularly mentioned and described in the said indenture, to have and to hold the same for the full term of 2 five years to commence on the twentieth day of April in the year 1908, the plaintiff in and by the said indenture covenanting to take and hold the said premises for the said term, to pay to the defendant certain sums in the said indenture specified and stipulated by way of rent for the said premises and to do and perform certain other acts in and upon the said premises and in relation thereto, as by the said indenture, reference thereunto being had, will more fully and at large appear; and

Whereas in and by the indenture aforesaid, the defendant did, amongst other things, covenant and agree with the plaintiff in the manner, to the effect, and in the words following, that is to say:

"It is hereby covenanted and agreed by and between the parties hereto and the owner of said premises that should the said Lessee desire to purchase said premises, that he shall have first option to do so for the sum of Twenty-seven thousand (\$27,000) Dollars, at any time during his tenancy and should the agent or owner thereof have an opportunity to sell during the term of this lease, that he or they will first notify said Lessee and give him the option to purchase for Twenty-seven Thousand (\$27,000) Dollars, before selling to any one else.

"It is further agreed that should the agent, Percy H. Russell, or the owner of said premises have an opportunity to sell said premises during said lease and said Lessee declines or is unwilling to purchase for the said sum of Twenty-seven Thousand (\$27,000) Dollars, in such event said agent, Percy H. Russell, or owner reserves the right to sell said property upon payment to said Lessee of Two Thousand (\$2,000) Dollars, and in such event said owner is to give said Lessee six (6) months' notice to remove from and quit said premises."

By virtue of which indenture and in pursuance thereof, afterwards, to-wit, on the said twentieth day of April in the year 1908, at the place aforesaid, the plaintiff entered into the said demise premises and became possessed thereof, and thereafter during the term aforesaid, remained and continued to be in possession thereof,

3 fully and punctually keeping and performing all the covenants, agreements and engagements which were, in and by the indenture aforesaid, to be by him kept and performed; Thereafter, that is to say, after the commencement of the term

aforesaid and after the entry as aforesaid of the plaintiff, to-wit, on the tenth day of May, in the year 1912, and on a day and at a time within the said term, the plaintiff then and there being in occupation and possession of the premises aforesaid and holding the same by virtue of the indenture aforesaid and then fully keeping and performing and having fully kept and performed all and singular the covenants which by the terms of the said indenture were by him to be kept and performed, the defendant did sell and convey the premises aforesaid and her reversion therein to one Raymond H. Van Nest, the defendant having theretofore notified the plaintiff that she, the defendant, had opportunity to sell the said premises and given him, the plaintiff, the option to purchase the same for twenty-seven thousand dollars and the plaintiff having declined to purchase the said premises for the said sum;

Whereby an action hath accrued to the plaintiff to demand and have of the defendant the sum of two thousand dollars;

Yet the defendant hath not paid the plaintiff the said sum of two thousand dollars, or any part thereof, although she hath been often thereunto requested, but hath wholly failed and refused so to do, to the damage of the plaintiff in the said sum of two thousand dollars;

Wherefore the plaintiff brings his suit, and he claims on account thereof the said sum of two thousand dollars, with legal interest thereon from the tenth day of May, in the year 1912, together with the costs of this action.

4 II. And the said plaintiff further sues the said defendant for other money payable by the defendant to the plaintiff, for that,

Whereas, heretofore, to-wit, on the twelfth day of March in the year 1908, at the City of Washington in the District of Columbia, by a certain agreement in writing then and there made and entered into by and between the plaintiff and the defendant, which was subscribed by the plaintiff and by one Percy H. Russell, who was the agent of the defendant duly authorized to execute and subscribe the same for and on behalf of the defendant and whose action in that behalf was afterwards duly and expressly ratified in writing by the defendant,

In consideration that by the said agreement the plaintiff agreed and contracted to take certain premises, being a certain parcel of real property situated in the city aforesaid and which are particularly mentioned and described in the said agreement, and to hold the same as tenant of the defendant for the full term of five years to commence on the twentieth day of April in the year 1908, and in consideration further that by the said agreement the plaintiff agreed and contracted to pay to the defendant the sum of seventy dollars for each month of the said term by way of rental for the said premises, and also to pay the water rent and the gas and electric light bills which should become due and chargeable on account of and against the said premises as the same should become due, and that he would at his own expense and cost make all the repairs to the said premises which should be rendered necessary by his negli-

gence, excepting repairs to the roof, to the sewer and the water mains, and should make any unstopping of the sewer and that he would not use the said premises for any disorderly or unlawful purpose without the written consent of the defendant,

5 The defendant did demise and let to the plaintiff the said premises for the term of five years to commence on the day last aforesaid, and did, in and by the said agreement, agree and contract amongst other things with the plaintiff in the manner and to the effect and in the language following, that is to say:

"It is hereby covenanted and agreed by and between the parties hereto and the owner of said premises that should the said Lessee desire to purchase said premises, that he shall have first option to do so for the sum of Twenty-seven thousand (\$27,000) Dollars, at any time during his tenancy and should the agent or owner thereof have an opportunity to sell during the term of this lease, that he or they will first notify said Lessee and give him the option to purchase for Twenty-seven Thousand (\$27,000) Dollars, before selling to any one else.

"It is further agreed that should the agent, Percy H. Russell, or the owner of said premises have an opportunity to sell said premises during said lease and said Lessee declines or is unwilling to purchase for said sum of Twenty-seven Thousand (\$27,000) Dollars, in such event said agent, Percy H. Russell, or owner reserves the right to sell said property, upon payment to said Lessee of Two Thousand (\$2,000) Dollars, and in such event said owner is to give said lessee six (6) months' notice to remove from and quit said premises."

By virtue of which agreement and in pursuance thereof, afterwards, to-wit, on the day last aforesaid, at the place aforesaid, the plaintiff entered into the said premises and became possessed thereof, and thereafter during the term aforesaid remained and continued in possession thereof, fully and punctually keeping and performing all and singular the engagements which were by the said agreement by him to be kept and performed and which have been hereinbefore stated and set out;

Thereafter, that is to say, after the commencement of the term aforesaid and after the entry as aforesaid of the plaintiff, to-wit, on the tenth day of May, in the year 1912, and on a day and at a time within the term aforesaid, the plaintiff being then in
6 possession of the said premises and holding the same by virtue of the agreement aforesaid, and then fully keeping and performing and having fully kept and performed all and singular the engagements which by the terms of the said agreement were by him to be kept and performed, the defendant did sell and convey the said premises to one Raymond H. Van Nest, the defendant having theretofore notified the plaintiff that she, the defendant had opportunity to sell the said premises and given him, the plaintiff, the option to purchase the same for twenty-seven thousand dollars and the plaintiff having declined to purchase the said premises for the said sum;

Whereby an action hath accrued to the plaintiff to demand and have of the defendant the sum of two thousand dollars;

Yet the defendant hath not paid the plaintiff the said sum of two thousand dollars, or any part thereof, although she hath been often thereunto requested, but hath wholly failed and refused so to do, to the damage of the plaintiff in the said sum of two thousand dollars;

Wherefore the plaintiff brings his suit, and he claims on account thereof the said sum of two thousand dollars, with legal interest thereon from the tenth day of May, in the year 1912, together with the costs of this action.

III. And the said plaintiff further sues the said defendant for other money payable by the said defendant to the said plaintiff, for that,

Whereas, heretofore, to-wit, on the tenth day of May, in the year 1912, at the City of Washington, in the District of Columbia, the defendant was indebted to the plaintiff in the sum of two thousand

7 dollars on account of goods theretofore sold and delivered by the plaintiff to the defendant, and of work and labor done and materials furnished by the plaintiff for and to the defendant at her request, and of money lent by the plaintiff to the defendant, and of money had and received by the defendant to the use of the plaintiff, and of money found to be due from the defendant to the plaintiff upon accounts stated between them, and of money which the defendant was liable and obligated to pay to the plaintiff by reason of agreements theretofore made upon a valuable consideration between them, which said sum was to be paid by the defendant to the plaintiff when the defendant should be thereunto requested;

Whereby and by reason of the said sum being wholly unpaid an action hath accrued to the plaintiff to demand and have of the defendant the said sum;

Yet the defendant, although often thereunto requested, hath not paid to the plaintiff the said sum or any part thereof, but so to do hath wholly failed and refused, and still doth refuse, to the damage of the plaintiff in the said sum;

Wherefore the plaintiff brings suit; and he claims on account thereof the sum of two thousand dollars with legal interest thereon from the said tenth day of May, in the year 1912, together with the costs of this action.

CHARLES A. KEIGWIN,
HAYDEN JOHNSON,
Attorneys for Plaintiff.

Demurrer.

Filed December 26, 1913.

* * * * *

8 Comes now the defendant, Christina Cecelia Coleman, by her attorney, and says that the first and second counts of the declaration filed herein by the plaintiff are bad in substance,

The matter of law intended to be argued in support of this demurrer is that it appears from the facts stated in said declaration that the contingency upon the happening of which the defendant was to pay the plaintiff the sum of two thousand dollars as claimed therein, did not happen.

Comes again the defendant aforesaid by her attorney, and moves the Court to require a bill of particulars in respect of the third count of the declaration aforesaid; and for a ground of this motion shows to the Court that the said count is indefinite and uncertain in that it fails to specify for what goods sold and delivered by the plaintiff to the defendant, or for what work and labor done or materials furnished, or for what money, or by reason of what agreements, it is claimed by the plaintiff that the defendant is indebted to or has promised to pay the plaintiff the sum of two thousand dollars as claimed in the said count.

PAUL E. LESH,
Attorney for the Defendant.

To Charles A. Keigwin, Esquire, and Hayden Johnson, Esquire:

Please take notice that the above demurrer and motion to strike out will be for hearing on Friday, January the 9th, 1914.

PAUL E. LESH,
Attorney for the Defendant.

Service of the above demurrer, motion to strike out and notice acknowledged this 26th day of Dec. 1913.

HAYDEN JOHNSON,
Attorneys for the Plaintiff.

9 Supreme Court of the District of Columbia.

FRIDAY, January 30th, 1914.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * *

Upon consideration of the demurrer filed herein to the first and second counts of the declaration, it is ordered that said demurrer be and the same is hereby sustained.

Further upon consideration of defendant's motion filed herein for a bill of particulars as to the third count of the declaration, it is ordered that plaintiff file such bill of particulars within ten days hereof.

FRIDAY, February 6th, 1914.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * *

Comes now the plaintiff by his attorney, and in open court, discontinues the third count of his declaration and elects to stand upon

the first and second counts of said declaration. Wherefore, a demurrer to said first and second counts having been sustained January 30th 1914, it is considered that the plaintiff take nothing by this action, that the defendant go hence without day, be for nothing held and recover of the plaintiff his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the plaintiff by his attorney in open court, notes an appeal to the Court of Appeals, whereupon the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars.

10

Memorandum.

February 20, 1914.—Appeal bond approved and filed.

Assignment of Error.

Filed March 2, 1914.

* * * * *

The appellant, Jacob Keroes, assigns as reversible error that the court erred in sustaining the demurrer of the defendant to the first two counts of the declaration, and entering judgment for the defendant.

HAYDEN JOHNSON,
CHAS. A. KEIGWIN,
Attorneys for Plaintiff.

Designation of Record.

Filed March 2, 1914.

* * * * *

The Clerk will please have prepared record on appeal in the above entitled cause, said record to include:

1. Plaintiff's declaration.
2. Defendant's demurrer.
3. Order sustaining demurrer.
4. Plaintiff's order of discontinuance as to third count and election to stand on first and second counts of declaration.
5. Entry of judgment.
6. Memorandum of approval and filing of bond on appeal.
7. Assignment of error.
8. Designation of record on appeal.

CHAS. A. KEIGWIN,
HAYDEN JOHNSON,
Attorneys for Appellant.

11 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

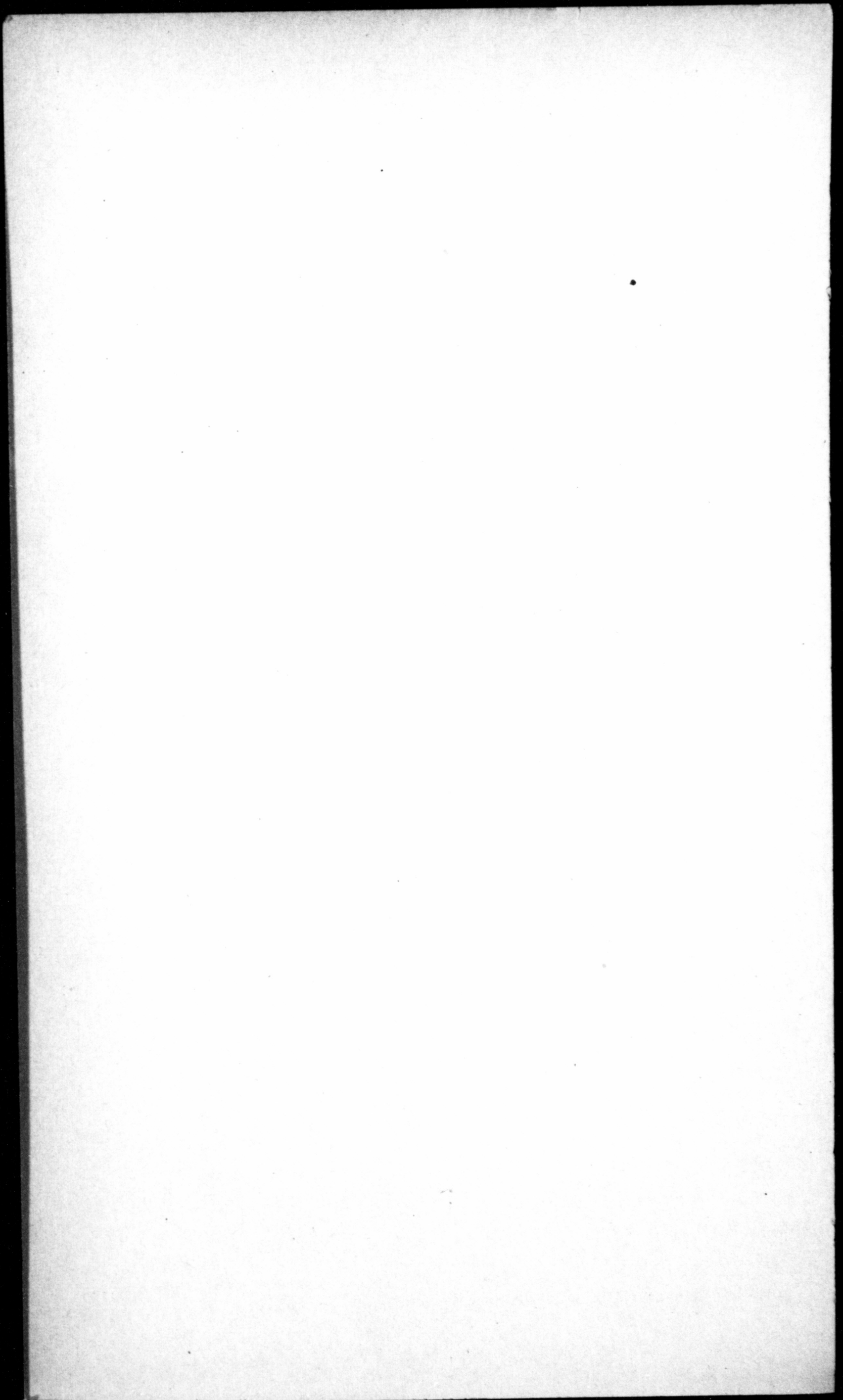
I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 10, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 56009 at Law, wherein Jacob Keroes is Plaintiff and Christina Cecelia Coleman is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of March, 1914.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia, Supreme Court. No. 2668. Jacob Keroes, appellant, vs. Christina Cecelia Coleman. Court of Appeals, District of Columbia. Filed Mar. 25, 1911. Henry W. Hodges, clerk.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

JUN-13-1914

Harry W. Hodges
Clark

IN THE
Court of Appeals, District of Columbia

No. 2668.

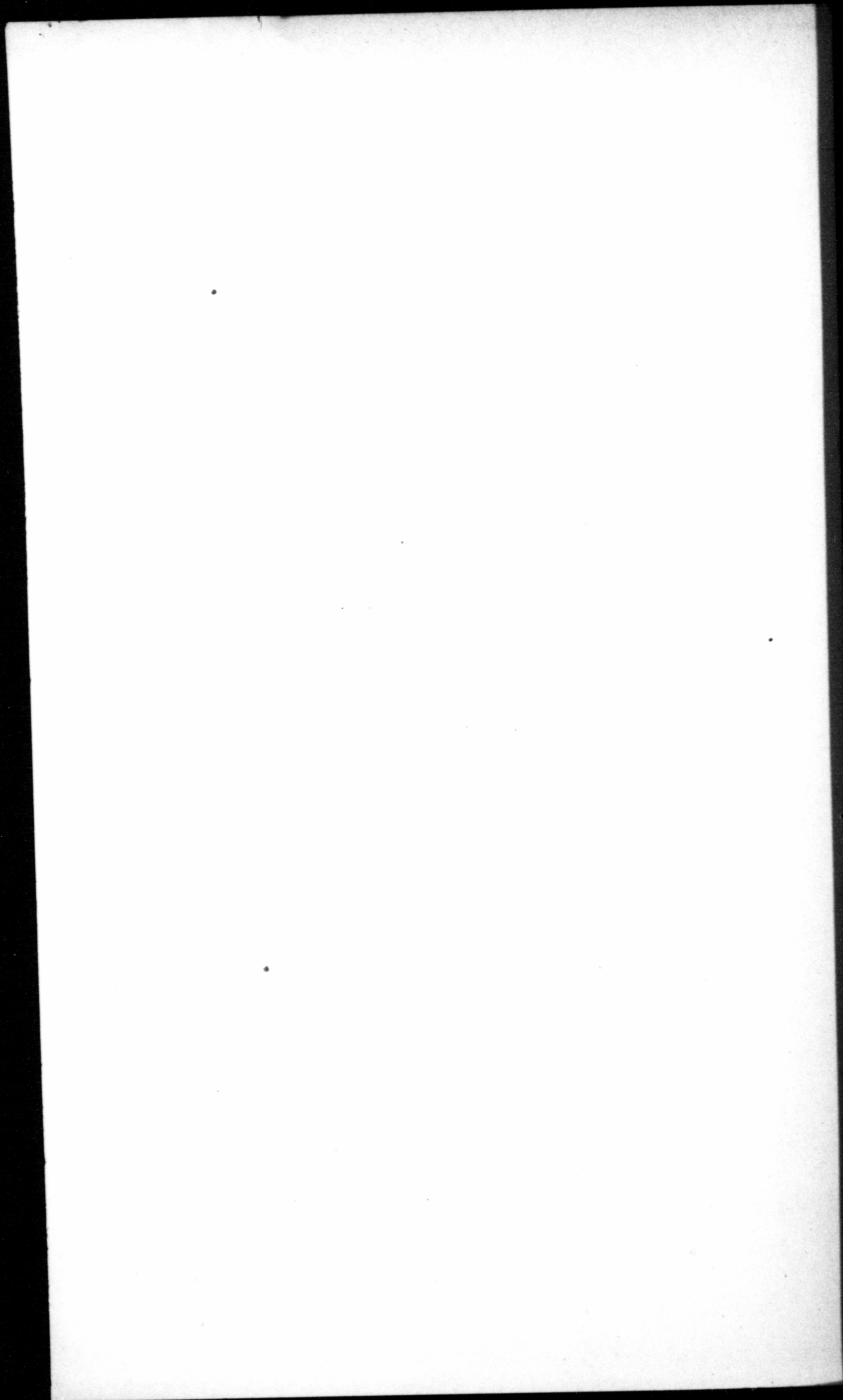
JACOB KEROES, *Appellant*,

vs.

CHRISTINA C. COLEMAN.

BRIEF FOR THE APPELLANT.

CHAS. A. KEIGWIN,
HAYDEN JOHNSON,
For Appellant.



IN THE
Court of Appeals, District of Columbia

No. 2668.

JACOB KEROES, *Appellant*,

vs.

CHRISTINA C. COLEMAN.

BRIEF FOR THE APPELLANT.

STATEMENT.

In April of 1908, the appellee demised, by a lease under seal, certain premises to the appellant for a term of five years. Among the covenants contained in the lease was one providing that the lessee should have the option to purchase the premises for the price of \$27,000 at any time during the term, and that, if the lessor should have an opportunity during the term to sell at that price, she should so notify the lessee and give the option to purchase at that price. The lease thereupon provides:

“It is further agreed that, should the agent, Percy H. Russell, or the owner of said premises have an opportunity to sell said premises during said lease, and said lessee declines or is unwilling to purchase for the said sum of twenty-seven thousand dollars (\$27,000),

in such event said agent, Percy H. Russell, or owner reserves the right to sell said property upon payment to said lessee of two thousand dollars, and in such event said owner is to give said lessee six (6) months' notice to remove from and quit said premises" (p. 2).

The appellant, in pursuance of this lease, entered upon the premises in April of 1908 and continued in possession for the term of the lease. In May of 1912 the lessor found an opportunity to sell the property for \$27,000; she so notified the lessee, who declined to buy at that price; whereupon the appellee sold to a third party. No notice to quit was given the lessee, and he remained on the premises until the termination of his lease in April of 1913.

The appellant demanded of the appellee payment of two thousand dollars, as due to him in virtue of the covenant quoted. Such payment being refused, the present action was brought. Judgment was rendered for the defendant on demurrer to the declaration, and from that judgment the plaintiff appeals.

ASSIGNMENT OF ERROR.

It will be submitted that the court below erred in sustaining the demurrer to the first two counts of the declaration.

ARGUMENT.

The covenant above quoted is an unqualified stipulation on the part of the lessor to pay to the lessee two thousand dollars in the event that the lessor shall sell the property during the term. Should the property be so sold the lessor's engagement becomes absolute, there being no provision that the lessee's right to the payment shall depend upon any circumstances, whether incident to the sale or otherwise arising, or upon anything else than the mere fact of the sale.

An absolute agreement of such character must be performed, although it may be conjectured that the obligor did not contemplate precisely the conditions in which performance becomes obligatory and would have limited his liability had possible contingencies occurred to his mind.

In *Paradine vs. Jayne*, the leading case on this point, decided in 1646, and reported in *Aleyn*, 27, the action was for rent on a lease. The plea was that, during the term, the premises had been forcibly occupied by a hostile army, whereby the defendant had been unable to take the profits. On demurrer the plea was held bad.

"And this difference was taken: that where the *law* creates a duty or charge, and the party is disabled to perform it without any fault in him, and hath no remedy over, there the law will excuse him. * * * But where a party, by his own *contract*, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

In a much more modern case in New Jersey the same rule was applied, though confessedly working great hardship in the particular instance, the court observing:

"No matter how harsh and apparently unjust in its operation the rule may occasionally be, it can not be denied that it has its foundation in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract."

These cases, with others to like effect, were approved and made the basis of decision by the Supreme Court of the United States in a well known case coming from this District:

Dermott vs. Jones, 2 Wall., 1.

The only ground upon which any qualification of the lessor's engagement can be suggested is the provision that in case of a sale to a third party the "owner to give said lessee six months' notice to remove from and quit said premises."

On the face of it at least, this is not a qualification of the covenant to pay two thousand dollars. It rather appears to be an additional obligation assumed by the lessor. It does not derogate from the preceding engagement, but rather augments it by an added assumption. The lessor is not only to pay the money, but to terminate the lease and discharge the tenant from any duty to attain to a stranger. The supplementary clause seems to be one introduced in the interest and for the benefit of the lessee; and, since it was therefore one which he might waive, the fact that he did not insist upon being exonerated of the lease, but continued his tenancy until the end of the term, is of no significance in relation to the previous obligation assumed by the landlord.

If it be suggested that this additional clause implies that the payment of the money shall be conditional upon the ouster of the tenant, the answer is, that the clause does not say that or anything like that. The very most that the court could say in favor of this construction is *voluerunt sed non clixarunt*. It may be conjectured that the parties meant that the money should not be due unless the tenancy were terminated, but certainly they have not expressed that meaning in any words which have that effect. To say that the lessor shall pay two thousand dollars *and* shall give notice to quit, is by no means equivalent to saying that he need not pay the money *unless* he shall give notice to quit.

To hold that the obligation to pay the money is made contingent upon the ouster of the tenant is, therefore, to

ascribe by mere inference a meaning to the language which it does not in itself bear, and to read into the contract a qualification which the parties themselves did not write. It may, indeed, be that the parties had this in mind. It is equally consistent with the words they have used to suppose that they meant something else. Whether one or the other conjecture be correct, any interpretation which varies the obligation by the conjectured effect of the added clause is obnoxious to the objection that it varies the effect of a written contract by a collateral agreement which is not expressed in the writing.

The rule of law on this point has been well considered by this court in the case of *Bieber vs. Gans*, 24 App. D. C., 517. There it was sought to derogate from a written obligation by proof that the contract was subject to certain contingencies provided for in a contemporaneous collateral parol understanding. In holding that the written matter could not be varied by the parol contract, the opinion quoted from *Seitz vs. Brewers, etc., Co.*, 141 U. S., 510, this passage:

“Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proved by parol, if, under the circumstances of the particular case, it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as to impart a complete legal obligation, without any uncertainty as to the object

or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing."

Let it be supposed that, in this case, there existed a parol understanding to the effect that the lessor should not be obliged to pay the two thousand dollars unless the sale should necessitate a termination of the lease, and that in such event she should give the lessee notice to quit, whereupon he should vacate the premises. The words used in the written contract certainly do not embody any such agreement, there being no hint of the contingency supposed or of any duty to vacate assumed by the lessee. Let it be supposed that the defendant, for the sake of supplementing the confessed insufficiency of the language actually written, had pleaded that such a collateral contract existed and set out its terms. Such a plea would have been clearly demurrable upon elementary principles and within the precise limitations laid down in the passage last quoted. In the first place, the lease is not entirely silent upon the subject-matter of the supposed parol contract, the very essence of the appellee's present contention being that the lease does suggest by partial statement a collateral parol contract, and the very difficulty of her position being that the lease only partially and quite ineffectually embodies the terms of that contract. Again, the supposed collateral contract is by no means in its nature collateral to the stipulation in the lease, but, on the contrary, is very part and parcel of the engagement to pay the money, being, in fact, *ex hypothesi*, a qualification of that engagement. Moreover, there is nothing in the paper to suggest that it is incomplete or does not embody the whole contract between the parties, and "the writing itself upon its face is couched in such terms as to impart a complete legal obligation, without any uncertainty as to the object or extent of the engagement."

A plea, therefore, undertaking to set up a collateral contract such as is supposed, and seeking to eke out the inadequacy of the written words by averment of further facts, would be manifestly demurrable. Yet, if the position of appellee be correct, this court is competent to do without a plea what could not be done by means of a plea, namely, to make the clause providing for notice to quit evidence of a collateral contract in virtue of which the obligation to pay money should not become effective except in certain contingencies not defined in the paper itself.

Again, let it be supposed that the lessee, in taking the premises, contemplated making substantial and permanent betterments thereon for which he considered that he should be entitled to some abatement of the rent; that the lessor, although unwilling to reduce the rent, was willing to recognize the merits of the lessee if the accession of permanent value should be demonstrated by her ability to sell at \$27,000; and that it was accordingly agreed that the lessee should receive \$2,000 in case she should be able to sell at the price named; and that it was further agreed that the lessee should surrender the premises, if so desired, upon six months' notice to quit and the payment of \$2,000.

This was, as appellant's counsel are informed by their client, the actual arrangement and the real reason and sense of the agreement. Without undertaking to suggest this as matter of fact, counsel do suggest that, as an hypothesis, such a state of facts is as consistent with the language of the lease as is the hypothesis offered on the other side. Whether one state of facts or the other be the true one is mere matter of conjecture and doubtful inference from the ambiguous form of words used in the lease.

It will further be observed that, if the appellant's version of the case be correct, it could not have been pleaded. The same considerations which precluded the appellee to plead

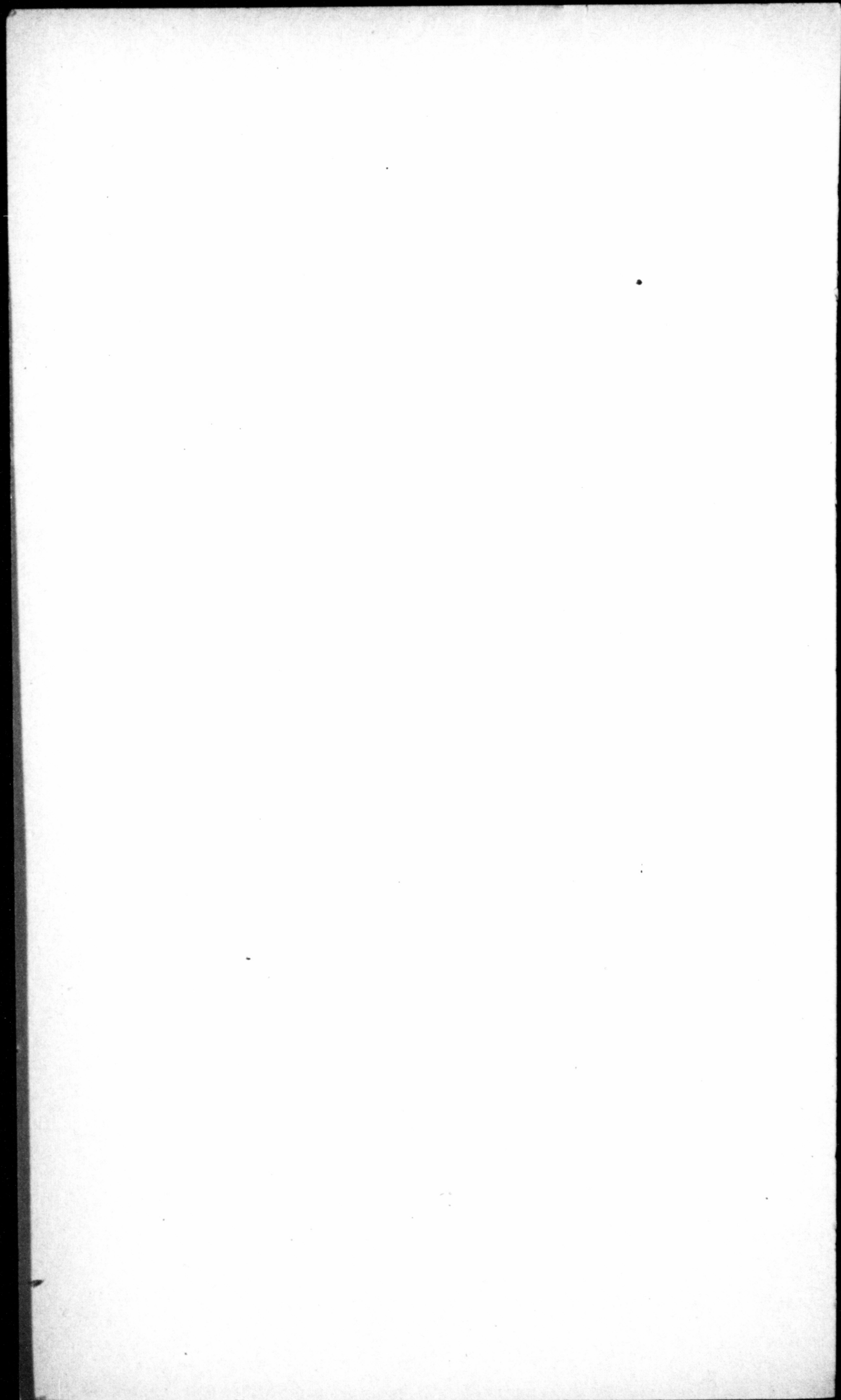
the facts which she seeks to infer from the wording of the lease would equally preclude the court to go into the extrinsic matters upon which the appellant relies. Had either party undertaken to set up his or her understanding of the parol agreement and the other circumstances attendant upon the lease, it would have been an attempt to vary the written words by extraneous parol matters, which would have violated the elementary rule on the subject.

If the court below was correct, it is because the court read into the lease some very material stipulations which are not in the words. In any case, that court must have inferred from the language actually used a collateral parol contract to the effect that the lessor's engagement to pay money should not become effective unless the tenant should be dispossessed. That stipulation is not in the lease. The most that can be said of the language employed is that it might support such an inference or it might support an essentially different one. If that be the true view, the court, in undertaking to resolve an ambiguity, could only guess at the correct meaning. If the court was not bound to act on the paper alone, then it was a situation for evidence to show the real meaning of the ambiguous words.

If the foregoing argument is sound, the appellant is entitled to judgment on the mere sense of the language used in the lease. If counsel are at fault upon that point, it must be because, in such a case, parol proof is competent to elucidate the meaning of doubtful phraseology. In that event the case should be remanded in order that, by appropriate pleading, the proper issue shall be framed.

It is submitted that, in either view of the law, the judgment should be reversed.

CHAS. A. KEIGWIN,
HAYDEN JOHNSON,
For Appellant.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT.-1--1914

Henry W. Hodges.
Clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1914

No. 2668.

JACOB KEROES, APPELLANT,

vs.

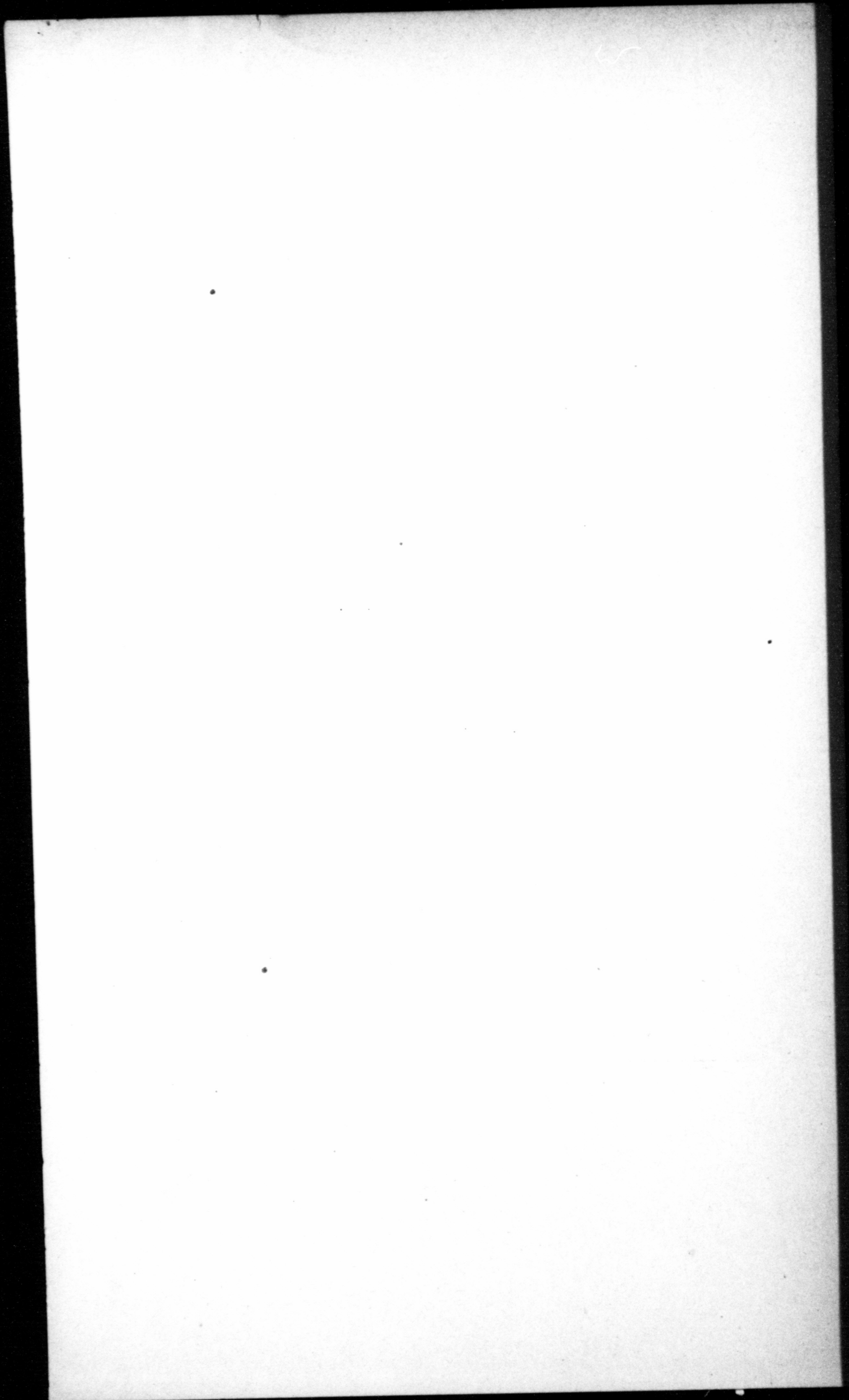
CHRISTINA CECELIA COLEMAN.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

PAUL E. LESH,

Attorney for Appellee.



In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1914.

No. 2668.

JACOB KERQES, APPELLANT,

vs.

CHRISTINA CECELIA COLEMAN.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

**Statement—The Respective Contentions of the Appellee
and Appellant.**

The facts sufficiently appear from the statement contained in the brief for the appellant.

The sole question involved in this appeal is the construction of the provisions contained in the lease quoted in the brief for the appellant and more fully in the record (pp. 2, 4), the important portion of which is as follows:

“ . . . in such event said agent, Percy H. Russell, or owner reserves the right to sell said property upon payment to said lessee of two thousand (\$2,000) dollars, and in such event said owner is to give said lessee six (6) months' notice to remove from and quit said premises.”

The appellee and the court below construed this provision as vesting in the landlord a right, or option, to put an end to the tenancy and to sell the entire fee, the leasehold as well as the reversion, in which event the tenant was to receive a six months' notice to quit and the two thousand dollars as compensation for the surrender of the remainder of his term.

Therefore, since it appeared from the declaration that the appellee landlord had sold merely her reversion and had not attempted to disturb the appellant lessee, and that the appellant had remained in possession of the leased property under the lease during the entire term, the court below sustained the appellee's demurrer, which was upon the ground that—

“the contingency upon the happening of which the defendant was to pay the plaintiff the sum of two thousand dollars, did not happen” (Rec., p. 6).

The appellant, however, unsuccessfully contended below and now contends in this court that the effect of the provision was to make it the duty of the landlord to pay the tenant two thousand dollars, if and when he sold, during the tenancy, whether he sold the fee or merely his reversion and whether or not the tenant remained in possession.

The appellant claims that the provision is literally an unqualified stipulation to pay the amount named in the event of a sale, and that the appellee must rely upon some parol understanding not embodied in the written lease to support her construction of this provision.

The appellee, however, not only concedes but urges that the understanding of the parties in respect to the meaning of their written agreement must be manifested by that agreement, when properly construed.

**The Construction Adopted by the Court Below is the
Literal Reading of the Provision in Question.**

Literally, the provision in question is the reservation of a right to the lessor, not the grant of a right to the tenant. Contrary to the statement in the appellant's brief, it does not provide that the lessor *shall pay* to the lessee any sum whatever, but reserves to the landlord a right which is conditioned upon such payment.

The right so reserved to the owner is the right "to sell said property."

At first glance there might seem room for doubt as to what was meant by a sale of the "property," as in the "property" the owner had, by the terms of the lease, only a reversion, with a leasehold interest in the lessee.

This ambiguity is quickly resolved, however, by the next phrase, which is, "and in such event said owner is to give said lessee six (6) months' notice to remove from and quit said premises." It then becomes clear that the sale of the "property" which was contemplated was such as would put an end to the leasehold. Therefore, it was a sale of the entire fee which was contemplated, a sale of the leasehold and the reversion.

In the present case no such sale took place, no notice was given, and the tenant did not quit the premises, but continued for nearly a year and until the end of the term, as a tenant of the new landlord.

**The Construction Adopted by the Court Below is
Reasonable.**

Furthermore, it is reasonable to conclude that the purpose of the payment, upon the making of which the landlord was reserved an additional right, was to compensate the tenant for something which he would lose upon the exercise of the right so reserved. If the landlord sold only his reversion, the tenant lost nothing;

if the landlord sold the entire title—that is, the leasehold and the reversion—then the tenant would lose something—that is, the remainder of his term. It is reasonable to conclude, therefore, that the \$2,000 were to be paid to the tenant only if the landlord sold the “property”—that is, the entire fee simple.

Opposing this view, the appellant suggests only an hypothesis, not warranted by the record. Assume, the appellant says, that the lessee made substantial betterments on the premises, in consideration of which the \$2,000 provision was inserted in the lease.

But even upon this assumption the lessee would get the benefit of the betterments if he remained in possession undisturbed during the five-year term, and it would be immaterial who became his landlord; but if the term was curtailed, then he would not enjoy the betterments for the full term, and should be compensated.

The appellant seeks to aid this hypothesis by assuming that the payment was to be made for betterments “if the accession of permanent value should be demonstrated by her ability to sell at \$27,000” (Appellant’s Brief, page 7). As a matter of fact, the sale was not for nearly so much as \$27,000, and no pretense to that effect appears in the record.

It seems, therefore, that while the appellee’s construction is reasonable, the appellant’s construction is unreasonable and would result in the tenant getting something for nothing.

What the parties intended by the provision becomes more clear when we consider what would have been the landlord’s rights if the provision had not been inserted.

Independently of any such provision, the landlord had a right to convey the rents and reversion, subject, of course, to the provisions of the lease. (Authorities supporting this elementary proposition are collected in 24 Cyc., at page 926). Therefore, if the clause had any

such effect as it purported to have, that is, any effect as the reservation of an additional right to the lessor, it gave to the lessor the right to sell more than merely the reversion. What was not reversion was leasehold. The additional right given by the lease to the landlord was, therefore, the right to sell the leasehold with the reversion, upon making the payment to the lessee.

It is probable, though not at all essential to the appellee's contention, that a sale of the reversion by the landlord (such as could have been made independently of the provision now in question), would transfer, to the landlord's grantee, the right of the landlord, created by this provision, to sell free and clear of the lease. It was so held, under similar leases, in *Hadley vs. Bernero* (97 Mo. App., 314); *Roberts vs. McPherson* (62 N. J. Law, 165); *Douglaston Realty Co. vs. Hess* (124 App. D. N. Y., 508), and *Butler vs. Meth* (122 N. Y. Supp., 271). The foregoing cases well illustrate the transferability of the reversion with all its rights and incidents; they hold also, by necessary implication, that a conveyance by the landlord without disturbing the tenant, does not amount to an exercise of the right to sell the "property" as reserved in such leases, but is merely an exercise of the right which every landlord has to convey his reversion, subject to the lease, and does not, therefore, create any obligation upon the part of the landlord to pay the amount provided for in the lease as damages to the tenant for the destruction of his term.

**The Construction Adopted by the Court Below is in
Harmony With the Adjudicated Cases.**

The construction contended for by the appellant seems so unreasonable that it is not to be expected that courts of last resort have had occasion to pass upon it frequently. Such authorities as are to be found, however, are in accord with the contention of the appellee.

The case of *Foley vs. Constantino* (86 N. Y. Supp., 780), was decided by the appellate term of the Supreme Court of New York in 1904, on appeal by a tenant from a final judgment of the Municipal Court of the city of New York in a summary proceeding to remove the tenant for non-payment of rent. It appeared that one Ann Quirk had leased to the appellant for five years, from April 1, 1901, at a monthly rental of \$265. The court said:

"The lease, among other things, contains two clauses—one for a deposit of \$265 to secure the payment of rent and the performance of covenants, and the other provision 'that, should the party of the first part sell the said premises, she shall give to the said party of the second part (tenant) sixty days' notice in writing, said sum of two hundred and sixty-five dollars (\$265) together with five hundred dollars (\$500) to surrender said premises, and the said party of the second part on receiving said sixty (60) days' written notice, said sum of two hundred and sixty-five dollars (\$265) together with five hundred dollars (\$500), will surrender said premises to the said party of the first part, and not otherwise.' Subsequent to the execution of the lease, viz, on or about January 30, 1903, the lessor, Ann Quirk, conveyed the premises to the petitioner, of which conveyance the tenant had due notice. The tenant having failed to pay the rent for the months first above mentioned, these proceedings were instituted. The answer, after specifically denying each material allegation of the petition, sets up a counter-claim for \$765, alleged to be due under the covenant above quoted. . . . It is clear to us that the provision that the landlord, in the event of sale, 'was to give sixty days' notice in writing, the said sum of \$265, together with \$500, to surrender said premises,' means literally what it says, namely, not that notice of sale was intended, but notice to surrender, and that \$265

and \$500 should also be given to the tenant to surrender; i. e., as compensation for the surrender and loss of the remainder of the term, if the landlord so desires to end the lease. It is not, therefore, a provision which the tenant could claim the benefit of in the event of a sale to a purchaser who should be willing to continue the lease, as the plaintiff apparently was. It was merely the customary precaution, taken by an owner wishing to sell, so that the property might be sold free of tenancies, if so desired. It was an option, not to the tenant, but to the landlord. The record is barren of any proof that the landlord exercised such option. The mere sale and conveyance of the property by the lessor to the petitioner, and notice thereof to the tenant, did not, as claimed by the latter, have the effect of terminating the lease; on the contrary, it continued unimpaired; and, since it is undisputed that the rent has not been paid for the period in suit, and there being no valid counter-claim or offset to the claim for such rent, the final order in favor of the petitioner was properly made. The final order should therefore be affirmed, with costs."

To the same effect is the case of *Johnston vs. King*, (83 Wis., 8), decided by the Supreme Court of Wisconsin in 1892. This case is not only relevant to the main question arising upon this appeal, but also contains, we think, a complete answer to the suggestion contained in the brief for the appellant, that some extraneous matter not contained in the lease or present record might be adduced by further pleading by the one party or the other to show the true intent of the agreement. The case came up on appeal from a judgment of non-suit entered against the plaintiff, who, as assignee of a lessor, had sued to recover certain chattels which had been leased to the defendant. The lease read:

"that in case of sale of said property by the said party of the first part at any time during

said term, he shall forfeit to the party of the second part, as damages, the sum of \$21."

The court said:

"It was not necessary to amend the complaint by alleging what the understanding of the parties was in respect to the meaning of the written agreement. This must be manifested by the agreement when properly construed. The complaint sets out the substance of the provision of the contract referred to. It is evident the parties contemplated and understood that the lessor retained the right to sell the property leased, at any time during the term, and to execute such sale by a delivery of possession of it to the purchaser. This necessarily would terminate the lease by taking from the possession of the lessee the property, the subject of the lease. The provision that the lessor should forfeit to the lessee in such case, *as damages*, the sum of \$21, by fair implication, means that this sum was agreed on as stipulated damages for the termination of the lease of the property by a sale of it by the lessor. True the contract does not say in so many words that the sum of \$21, as damages, is to be paid for that reason. The payment clearly refers, however, to what might thereafter occur in relation to the performance of the contract of lease; and by fair implication the court must say that the intention of the parties was that this sum should be paid as a compensation to the lessee for the loss of the property, caused by its sale and the termination of his term.

" 'What is implied in a statute, pleading, contract, or will is as much a part of it as what is expressed.' *U. S. vs. Babbitt*, 1 Black, 61; *Wood Co. vs. Lackawanna I. & C. Co.*, 93 U. S., 624. In *Rogers vs. Kneeland*, 10 Wend., 218, 250, 252, 253, it is held to be a general principle, applicable to all instruments or agreements, that whatever may be fairly implied from the terms or language

of an instrument is, in judgment of law, contained in it. *Fox vs. Phelps*, 20 Wend., 447. The Circuit Court erred in sustaining the objection to the complaint and rendering judgment of nonsuit against the plaintiffs."

In *McDaniel vs. Callan* (75 Ala., 327), decided by the Supreme Court of Alabama, in December, 1883, an injunction was sought against an appellee lessee, who held under a lease reading in part (72 Ala., 96, 99):

"In case I should sell said lands before the expiration of said lease, the said McDaniel is to give possession, by being paid a reasonable valuation for the unexpired term of said lease; provided, also, that the said McDaniel shall not be required to give possession, or surrender the lease, in the spring of the year," etc.

The court said (p. 330):

"It is quite a mistake to suppose, as seems to be the theory of the appellees, that a mere sale and conveyance of the lands by the lessor operated a determination of the lease. The purchaser or assignee of the reversion had the privilege or option of determining it, but it was a bare privilege or option that he could exercise or not at his discretion. And he could exercise it only upon the performance of the condition expressed—the payment to the lessee of the reasonable value of the unexpired term. Without such payment, or the tender of it, the lease, with all its covenants and stipulations, remained in full force. The lessee, after such sale and conveyance, until such payment or tender, had the right to the unmolested use and enjoyment of the premises, and the right to continue the clearing or reduction to cultivation of the lands, according to the terms of the lease, and he was bound to the same duties and obligations which rested upon him before the sale and conveyance was made."

In *Lunke vs. Egeland* (46 Mont., 403), decided in 1912, the court said (p. 410):

"The lease also provides that the second party reserves the right to sell the premises at any time, 'but in such case he (Lunke) shall receive and the said second party shall pay \$1.50 per acre for any and all plowing, summer fallowing, and other work done by said first party on said land, the same to be in full of all claims or demands hereunder.' There was no necessity of reserving the right to sell if such sale was not to effect the lease. Egeland had such right in any event, and the consideration moving to Lunke, of \$1.50 per acre for all land plowed or fallowed 'in full of all claims or demands,' shows beyond doubt that it was to be paid as a remuneration to him for the loss of the unexpired portion of the lease."

Counsel for appellee has been able to discover no authority to the contrary, and it is certainly significant that no attempt to quote authority on this point is made in the brief for the appellant.

A Summary Reply to the Brief For the Appellant.

The brief for the appellant apparently makes but two points; one is, that whatever the appellee has undertaken to do, the appellee must do, no matter how unreasonable it may be to enforce compliance with any such supposed engagement made by the appellee; and the other, that no contemporaneous collateral parol stipulations can be read into the written contract. Both of those contentions may be conceded in the abstract, but it is submitted that neither have any application to the question here pending.

There remains the suggestion made in the concluding paragraphs of appellant's brief, that in the event that a cause of action is not stated in the declaration, the

cause should be remanded for further pleading. In reply the appellee calls attention to the fact that the appellant, having had opportunity under the rules of the court below, to amend, elected to stand upon his declaration (Rec., pp. 6-7). Furthermore, the matter suggested in the appellant's brief, which would form the subject of any such amendment, would be, for the reasons tersely summarized in the case of *Johnston vs. King, supra*, of no effect as varying the rights of the plaintiff under the lease.

It is, therefore, respectfully submitted that the judgment of the court below should be **affirmed**.

PAUL E. LESH,
Attorney for Appellee.